



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22nd day of September, 2004

Served: September 22, 2004

In the Matter of

**2005/2006 U.S.-CHINA AIR SERVICES
CASE AND DESIGNATIONS**

Docket OST-2004-19077

ORDER ON RECONSIDERATION

Summary

In this Order we are addressing petitions filed by American Airlines, Inc. (American) and Evergreen International Airlines, Inc. (Evergreen), for reconsideration of Order 2004-9-5 in the above-captioned proceeding. We grant in part and deny in part the relief requested by American, and deny the relief requested by Evergreen.

Background

By Order 2004-9-5, issued September 3, 2004, we instituted the *2005/2006 U.S.-China Air Services Case*. We invited U.S. carriers to file applications for authority to exercise new rights under the recently-amended U.S.-China aviation agreement, which permits an additional U.S. carrier to provide combination service effective March 25, 2005, an additional U.S. carrier to provide combination or cargo service effective March 25, 2006, award of additional combination frequencies that become available March 25, 2005, and additional combination and cargo frequencies that become available March 25, 2006.

In that Order, we stated that our principal objective in the proceeding would be to maximize the public benefits that would result from the authority conferred. To this end, we stated that we would consider which applicant would be most likely to offer and maintain the best services; the effect of those applicants' proposals on the overall market structure and level of competition in the U.S.-China market (and any other relevant market); and other traditional carrier selection factors where relevant. We set procedural deadlines for the proceeding, and stated that we expected applicants to provide specific service proposals at the direct exhibit stage.

The Order also included an Evidence Request that provided for the public disclosure of data for use by applicants, and stipulated what information each applicant needed to provide to support its application, including flight schedules and passenger/cargo traffic forecasts for both the 2005 and 2006 selection, source of aircraft, and other information.

Petitions for Reconsideration

On September 10, 2004, American and Evergreen each filed a Petition for Reconsideration of Order 2004-9-5.

American states that the Order does not adequately set forth what information should be included by applicants in this proceeding, and states that we should require “combination applicants by September 22 to identify their proposed routings between the U.S. and China, as well as their proposed weekly frequencies, departure and arrival times, and equipment type and configuration.”¹ It also states that combination applicants should state whether they are seeking the selection available in 2005 or the one available in 2006 (and, if willing to accept either, state their preferred year and whether they would accept the other year in the alternative).

American also states that we should require only a single traffic forecast, for the year ended March 25, 2006, regardless of whether the applicant seeks entry in 2005 or 2006. It states that a separate forecast for the 2006 selection would be entirely speculative and that to require two forecasts would add significant and unnecessary complexity to the proceeding.

American further requests that we provide that traffic data made available by the Department may be used by applicants in their exhibits and other pleadings on a public, non-confidential basis, so long as the data they contain are relevant and not carrier-specific. Finally, American seeks an addition to the procedural timetable to provide that by October 6, 2004, all parties file in this docket contact information for persons to receive printed copies of Direct Exhibits and Rebuttal Exhibits, and that parties be required to provide such printed copies, to relieve parties of the burden of printing these served documents from electronic submissions.²

Evergreen states that the Department should (1) delay for nine months the award of the available 2006 designation and frequencies; (2) divide the process for 2006 into two distinct phases; and (3) establish more specific decisional criteria for the 2006 awards. Evergreen states that it is premature for the Department to consider at this time awards that do not become effective for 18 months; that the record in the case would be invalid by that time; that it would be difficult for a new entrant to provide accurate data so far in the future; that, indeed, applicants for the 2006 awards need to know which carrier will receive the 2005 award when they draft their 2006

¹ Petition of American for Reconsideration of Order 2004-9-5, September 10, 2004 at 2.

² In addition to the elements of its petition already cited, American states that, for new entrants, rather than limiting any authority granted in this proceeding to that which they proposed in their applications, we should confer broad authority consistent with the route description in the revised U.S.-China agreement. However, American states that rather than seeking reconsideration on this issue, it will -- as provided in Order 2004-9-5 -- urge in its subsequent submissions in the proceeding that new entrants should receive broad U.S.-China authority.

proposals; and that the delay it proposes would allow applicants to present realistic proposals.³ Evergreen further states that the process for awarding the 2006 opportunities should be a two-step process, with the Department first deciding whether the designation should go to a combination or an all-cargo carrier, and then separately selecting the carrier to receive that designation. Finally, Evergreen states that it is concerned by our statement in Order 2004-9-5 that, in considering the merits of applications, we will, among other things, “consider other factors historically used for carrier selection where relevant.”⁴ Evergreen states that the Department has, therefore, left the decisional criteria unclear, and should indicate what decisional criteria it will use and how each criterion will be weighted; otherwise, applicants will be forced to guess in forming their proposals.⁵

Responsive Pleadings

Answers to the petitions were filed by American (to Evergreen’s petition), Continental Airlines, Inc. (Continental), Delta Air Lines, Inc. (Delta), Evergreen (to American’s petition), Federal Express Corporation (Federal Express), Gemini Air Cargo, Inc. (Gemini), and United Air Lines, Inc. (United).

American states that it opposes Evergreen’s petition on the ground that the proceeding should not be delayed. According to American, combining the 2005/2006 proceedings would be more efficient and consistent with the Department’s procedures. American disagrees with Evergreen’s argument that the selection process should include two separate evidentiary phases. American believes that creating such procedures would also be unduly burdensome. Finally, American urges the Department not to follow Evergreen’s suggestion to provide the parties with guidance as to how each decisional criterion would be weighed. American states the Department had previously noted that no single factor is decisive in all cases.⁶ For example, American cites the *U.S.-Colombia Combination Service Case*, where the Department stated that “in considering competing proposals of applicant carriers in comparative selection cases, it is our policy to weigh the importance of the various carrier selection criteria on a case-by-case basis depending upon the circumstances presented.”⁷

Continental supports American’s request that applicants be required to submit full service proposals, but urges the Department to require that all-cargo and combination carriers provide such information to facilitate expeditious proceedings. Continental also agrees with American that carrier traffic forecasts in the proceeding should not include cumbersome confidentiality procedures, provided that the data are not carrier-specific. Continental supports American’s request for a full list of parties by October 6, 2004, and requests that the Department permit overnight document delivery, clarifying exactly how service will be processed. In response to Evergreen’s petition, Continental urges the Department to decide on the type of carrier that will be selected in 2006 early, avoiding any complex, bifurcated proceedings. Continental also urges

³ Petition of Evergreen for Reconsideration of Order 2004-9-5, Sept. 10, 2004 . at 3.

⁴ Order 2004-9-5 at 3.

⁵ *Id.* at 6.

⁶ Answer of American to Petition of Evergreen, Sept. 14, 2004 at 10.

⁷ *Id.* (citing *U.S.-Colombia Combination Service Case*, Order 93-7-38 (July 26, 1993), at 17).

the Department to reject Evergreen's other requests because they fail to set forth adequate justifications for altering the set pattern of preparing service proposals in accordance with the Department's current schedule.⁸

Delta states that a consolidated proceeding would enable the Department to assess all the evidence and maximize the combined benefits of all available opportunities. Delta asserts that the public interest requires additional combination service in 2006, and that the Department should entertain applications in this proceeding only for combination service.⁹ Delta objects to American's request for a single forecast, based on Departmental precedent that relevant forecast data for each of the two separate designation years is necessary to make a sound decision. Delta states that the Department has "always required two separate traffic year forecasts."¹⁰ It agrees with American's petition for free usage of traffic data, provided that carrier-specific data remain confidential. Finally, Delta also agrees with American's request that the newly-designated carrier should be awarded broad certificate authority under the terms of the U.S.-China agreement.

Evergreen supports American's petition in that it confirms the need to separate the 2005 and 2006 designation and frequency allocation awards.¹¹ Evergreen agrees with American in that combining the designations would add an element of complexity. Evergreen disagrees with American's request for a single forecast for combination air carriers in 2006 because it would create confusion for an all-cargo carrier, such as itself, to compare cargo projections with combination projections. Finally, Evergreen reiterates its positions in its petition and urges the Department to take its views into consideration.

Federal Express agrees with American as to providing service proposals in their applications, but believes that requiring carriers to include arrival and departure times by September 22, 2004, is unreasonable and premature because that level of specificity requires a review of complex factors.¹² Federal Express agrees with American that clarification of the confidentiality procedures for use of traffic data would expedite that portion of the proceeding. However, Federal Express opposes American's request as to the service methods suggested, believing that such procedures would burden the parties with unnecessary costs.

Gemini states that the Department should first determine whether it will select a combination or an all-cargo carrier in 2006. Gemini urges the Department to modify the selection process depending on whether an all-cargo or a combination carrier is chosen. If the Department decides to designate an all-cargo carrier in 2006, Gemini requests that the Department start the selection process in mid-2005. If the Department decides to designate a combination carrier in 2006, Gemini requests that the Department implement the procedures as set out in Order 2004-9-5. Finally, Gemini agrees with American's request that the Department should submit a single traffic forecast for the year ending on March 31, 2006.

⁸ Answer of Continental to the Petitions of American and Evergreen, Sept. 4, 2004 at 5.

⁹ Answer of Delta to the Petitions of American and Evergreen, Sept. 14, 2004 . at 3.

¹⁰ *Id.* at 4.

¹¹ Answer of Evergreen to the Petition of American, September 14, 2004.

¹² Answer of Federal Express to Petitions of American and Evergreen, Sept. 14, 2004 at 1.

United states that it opposes American's petition only to the extent that it would prevent carriers from submitting passenger traffic forecasts for the 12 months ending March 31, 2006, for the 2005 selection and March 31, 2007, for the 2006 selection. United states that it would propose "distinctly different services in each of the two forecast years."¹³ United believes that the requirement for separate forecasts is necessary to allow the Department fully and fairly to evaluate the merits of its proposal.

Decision

We have decided to grant the petitions of American and Evergreen seeking reconsideration of Order 2004-9-5, and, on reconsideration, to grant in part and deny in part the relief sought by American, and to deny the relief sought by Evergreen.

With respect to the issues raised by American, first, we wish to clarify our statement in Order 2004-9-5 concerning the provision by applicants of specific service proposals.¹⁴ It was, and remains, our intention that all applicants (both combination and all-cargo applicants, and carriers filing for both the 2005 and 2006 opportunities) provide basic information on their proposals with their initial applications. We will, therefore, clarify that initial applications should include a description of their proposed services, including proposed routings, number of weekly frequencies proposed, and equipment type and configuration. We also agree with American that combination applicants should state whether they are seeking the 2005 or 2006 opportunity and whether they would accept the alternate year.¹⁵ We agree with Federal Express, however, that there is no need for applicants to file at this time more specific information concerning departure and arrival times for their proposed services. As is our usual practice, we will allow applicants to make necessary modifications to their proposals at the Direct Exhibit stage of this proceeding.

We will not adopt American's proposal that we require only a single traffic forecast, for the year ended March 31, 2006, for applications for either the 2005 or 2006 opportunities. Given that we anticipate making selections for two discrete periods and that applicants may wish to tailor proposals to one or the other of these periods, we find that the record will be strengthened by our having separate traffic forecasts for the two years in question. We have followed this approach in other multiple-year selection proceedings,¹⁶ and have seen no persuasive reason to follow a different course here.

With respect to the concerns raised by American and other parties about confidential treatment of certain traffic data, we will clarify that traffic data made available by the Department in this proceeding may be referenced by applicants, on a non-confidential basis, in Direct Exhibits and other pleadings, to the extent that such reference is relevant to the proceeding and the data

¹³ Answer of United to the Petition of American, Sept. 14, 2004 at 2.

¹⁴ In addition, we wish to clarify that, with respect to the procedural timetable set forth on page 4 of Order 2004-9-5, incumbent applicants seeking only additional frequencies must file their applications by September 22, 2004, the date shown in the timetable for the filing of "Certificate Applications."

¹⁵ To the extent that carriers have submitted applications that lack any of that information, they should submit a supplement to their applications containing all such information by September 24, 2004.

¹⁶ See, e.g., Order 99-11-14, Appendix A at 2, n. 2.

presented by the applicants are not carrier-specific and to the extent that such information cannot be identified to its original source. We find that such use will improve the record in this proceeding and will not prejudice or cause commercial harm to any party.

We will not adopt American's proposal requiring the provision of printed copies of Direct and Rebuttal Exhibits (or other pleadings in this proceeding) to the parties to the case. While parties are free to file with the Department, and serve on the parties, their submissions in paper form, the Department's regulations (14 CFR §302.3(a)(1)) provide for electronic submission of documents to the Department. Also, in Order 2004-9-5 we specifically authorized parties to serve documents on each other electronically if they so chose (or, at their option, by facsimile). American has not shown that electronic service on parties imposes a burden on recipients sufficient to alter this practice in this proceeding, or that withdrawing the flexibility to choose electronic service would be in the public interest. Accordingly, we shall leave in place the provisions on submissions set forth in Order 2004-9-5.¹⁷

As to the issues raised by Evergreen, we are not persuaded that our adoption of any of its proposals would be in the public interest.

In Order 2004-9-5, we stated that "[g]iven the phase-in schedule of the agreement, we feel that the traveling and shipping public, as well as the applicants, would be best served by our considering now, at the same time and in a single proceeding, the opportunities that will become available in the next two years."¹⁸ Instead of the one proceeding we announced in Order 2004-9-5, Evergreen would have us conduct three separate proceedings: the first to award the 2005 designation, the second to decide the nature of the 2006 designation, and the third to actually award the 2006 designation. We do not find such an approach to represent an efficient use either of the parties' or our own resources. Nor do we see it as serving the public interest, which calls here for giving the selected carriers as much time as possible to plan for and introduce new service into a transoceanic market where they will face established competitors. While a single proceeding approach may require the parties to make certain assumptions in preparing their evidentiary materials, we have found in past multi-year proceedings that such approaches are feasible and can generate an entirely adequate record for decision.¹⁹ Similarly, we wish to base our determination of the nature of the 2006 designation on a fully developed record and find that the public interest favors our doing so while keeping to the efficient timetable of a single proceeding, as indicated in Order 2004-9-5.

We will leave unmodified our description of the methodology we will use in deciding this proceeding. While Evergreen would have us define strict, weighted decisional criteria, there may be public interest factors developed in the record of the case that may prove to have decisional value in the particular circumstances presented; factors which, as we stated in Order

¹⁷ In light of our ruling here, we need make no modification to our procedural schedule to address American's request that parties file in the Docket a contact person for receipt of printed materials. The parties are of course free to arrange among themselves for mutually agreeable methods of document transmission and exchanges.

¹⁸ Order 2004-9-5 at 2.

¹⁹ See, for example, *U.S.-Israel Third-Country Code Sharing Opportunities Case*, Order 2001-5-24 (May 17, 2001).

2004-9-5, we have “historically used for carrier selection where relevant,”²⁰ and upon which parties may submit comments. Under these circumstances, we believe that the measure of flexibility we described is consistent with past practice and is in the best interests of all parties to this proceeding.²¹

ACCORDINGLY,

1. We grant the Petition of American Airlines, Inc. for Reconsideration of Order 2004-9-5, and, upon reconsideration, grant in part and deny in part the relief requested by the petitioner, to the extent set forth in this Order;
2. We grant the Petition of Evergreen International Airlines, Inc. for Reconsideration of Order 2004-9-5, and, upon reconsideration, deny the relief requested by the petitioner; and
3. We will serve this order on all U.S. certificated air carriers operating large aircraft, the National Air Carrier Association, the Air Transport Association; the U.S. Department of State (Office of Aviation Negotiations), the Federal Aviation Administration (AFS-200), and the Ambassador of the People’s Republic of China in Washington, D.C.

By:

KARAN K. BHATIA
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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²⁰ Order 2004-9-5 at 3.

²¹ See Final Rule and Policy Statement, 51 FR 43181, December 1, 1986.